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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3887-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN A. VICARI, a/k/a  
JOHN ARTHUR VICARI,

Defendant-Appellant.

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Submitted May 25, 2017 - Decided July 6, 2017

Before Judges Lihotz and Mawla.

On appeal from Superior Court of New Jersey,  
Law Division, Atlantic County, Indictment No.  
15-04-1036.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Ruth E. Hunter, Designated  
Counsel, on the brief).

Damon G. Tyner, Atlantic County Prosecutor,  
attorney for respondent (John J. Santoliquido,  
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant John A. Vicari pled guilty to second-degree  
possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-  
4(a), after being indicted for this and other offenses. According

to the State's plea offer, all other charges would be dismissed and the State would recommend a minimum five-year sentence, subject to a forty-two-month period of parole ineligibility, pursuant to the Graves Act, N.J.S.A. 2C:43-6(c).

Prior to sentencing, defendant, a first-time offender, filed a request for the prosecutor to waive the mandatory minimum sentence, in favor of a probationary sentence, or alternatively, to reduce the period of parole ineligibility, as provided by an amendment to the Graves Act. See N.J.S.A. 2C:43-6.2 (Section 6.2). The prosecutor rejected the request, and defendant sought review by the Presiding Judge of the Criminal Part. The judge reviewed the matter and issued an oral opinion, reduced to writing, on April 15, 2016. The judge concluded the prosecutor's decision not to request a waiver under Section 6.2 did not represent a patent and gross abuse of discretion. The judge imposed sentence in accordance with the recommendation in the plea agreement.

On appeal, defendant argues:

THIS COURT SHOULD VACATE THE ORDER DENYING DEFENDANT'S APPLICATION UNDER THE GRAVES ACT ESCAPE VALVE, N.J.S.A. 2C:43-6.2, AND REMAND FOR RESENTENCING. (Raised Below).

Following review, we reject defendant's arguments challenging the denial of a Graves Act waiver to provide a probationary sentence. However, we remand for further review of the denial of

a Section 6.2 waiver to reduce the mandatory period of parole ineligibility, implicating weighing of the applicable aggravating and mitigating factors, because we conclude the judge's analysis was flawed.

During the February 2, 2016 plea hearing, defendant voluntarily sought to plead guilty, accepting the terms of the negotiated plea agreement. He testified during the hearing, after waiving his right to call witnesses or proceed to trial. He confirmed he read each page and understood the plea agreement, including the maximum sentence he faced if convicted of the charged offense, which he understood was a crime governed by the Graves Act. Defendant also understood the State recommended a sentence of five years with a forty-two-month period of parole ineligibility. In addition, he agreed he had sufficient time to consult and review the agreement terms with his attorney, who answered all of his questions and whose advice, regarding the agreement and plea, he found satisfactory.

Defendant confirmed he was pleading guilty because he was guilty. He provided the following factual basis supporting his plea.

On December 14, 2014, defendant, while in his residence located on Fifth Avenue in Estelle Manor, engaged in a domestic dispute with his roommate, Ed Raff. Defendant kept a Smith &

Wesson .357 Magnum in his bedroom, which he lawfully owned and was licensed to possess. He retrieved the gun and aimed the weapon at Raff, intending to frighten or threaten him.<sup>1</sup> Defendant admitted his purpose in retrieving the weapon was unlawful.<sup>2</sup>

Defendant requested the prosecutor waive the mandatory minimum penalties imposed by the Graves Act. In addition to advancing the factors he believed supported waiver, he also identified similar cases where the prosecutor requested waiver. Notwithstanding defendant's presentation, the prosecutor declined to request waiver. Defendant sought review by the court.

The judge reviewed the written submissions and determined a hearing was warranted. At the close of arguments, the judge entered a bench opinion, which he later reduced to writing. He concluded the prosecutor's decision not to request a Section 6.2 waiver was not discriminatory or an abuse of discretion. The judge imposed the sentence as recommended in the plea agreement. This appeal ensued.

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<sup>1</sup> The pre-sentence report recounts defendant's statement that after he threatened Raff he pointed the gun at his own head and threatened to kill himself.

<sup>2</sup> Ultimately police arrested defendant, who was driving his vehicle while under the influence of alcohol. Defendant admitted he drank "about one-half pint," and was impaired when police stopped his car.

Defendant's appeal initially was listed on this court's September 21, 2016 excessive sentence oral argument calendar. R. 2:9-11. The reviewing panel ordered the matter relisted for plenary review.

"Appellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). We do not defer to legal determinations made by the trial judges, State v. Bolvito, 217 N.J. 221, 228 (2014), on these issues our review is de novo. State v. Gandhi, 201 N.J. 161, 176 (2010).

In adopting the Graves Act, N.J.S.A. 2C:43-6(c), the Legislature intended to impose significant mandatory penalties for certain illegal acts involving weapons.<sup>3</sup> State v. Robinson, 217 N.J. 594, 607 (2014). A person convicted of one of the designated crimes:

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<sup>3</sup> N.J.S.A. 2C:43-6(c) applies to those defendants convicted of: possession of a sawed-off shotgun or defaced firearm, N.J.S.A. 2C:39-3(b), (d); possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); possession of a firearm while committing certain drug-related or bias intimidation offenses, N.J.S.A. 2C:39-4.1(a); unlawful possession of a machine gun, handgun, rifle or shotgun, or assault firearm, N.J.S.A. 2C:39-5(a), (b), (c), (f); certain persons not to have weapons, N.J.S.A. 2C:39-7(a), (b)(2), (b)(3); manufacture, transport, disposition and defacement of machine guns, sawed-off shotguns, defaced firearms, or assault firearms, N.J.S.A. 2C:39-9(a), (b), (e), (g). The statute also applies to defendants who used or were in possession of a firearm while committing, attempting, or fleeing from other crimes.

who, while in the course of committing or attempting to commit the crime, . . . used or was in possession of a firearm . . . shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

[N.J.S.A. 2C:43-6(c).]

The significant punishment imposed by the Graves Act may be mitigated, as provided by an amendment, codified as N.J.S.A. 2C:43-6.2, which:

was enacted to authorize "the reduction of sentence for a person convicted of a first offense under the Graves Act if the prosecutor makes a motion before the assignment judge stating that the interests of justice would not be served by the imposition of the mandatory minimum term under the Graves Act." Senate Law, Pub. Safety & Def. Comm., Statement to S. No. 827 (1988); see also Assembly Judiciary Comm., Statement to S. No. 827 (1988).

[State v. Nance, 228 N.J. 378, 391 (2017).]

Section 6.2 authorizes a prosecutor to move before the Assignment Judge for a waiver of the Graves Act's mandatory minimum term of incarceration for certain first-time offenders. N.J.S.A. 2C:43-6.2. Section 6.2 empowers the Assignment Judge, or if so designated with the authority, the presiding judge of the Criminal

Part,<sup>4</sup> to "place the defendant on probation . . . or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole." Ibid.

Here, the Criminal Presiding Judge, as the delegated designee of the Assignment Judge, conducted a hearing to review the prosecutor's denial to seek a Section 6.2 waiver.<sup>5</sup> See State v. Watson, 346 N.J. Super. 521, 535 (App. Div. 2002) (reaffirming a defendant may seek application by arguing to the Assignment Judge the prosecutor's refusal is a patent and gross abuse of discretion (citing State v. Alvarez, 246 N.J. Super. 137, 147 (App. Div. 1991))).

Identifying the purpose of the Graves Act as "deterrence and only deterrence," State v. Des Marets, 92 N.J. 62, 68 (1983), the judge noted the "escape valve," set forth in N.J.S.A. 2C:43-6.2, may be utilized in those instances where imposition of the

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<sup>4</sup> See Administrative Office of the Courts, Memorandum, Motions for Waiver of the Graves Act Mandatory Minimum Term and Sentencing – Clarification Based on State v. Nance (June 12, 2017) (clarifying Assignment Judge's authority on Graves Act waiver issues).

<sup>5</sup> "Pursuant to a 2008 memorandum issued by the Administrative Office of the Courts, an assignment judge may delegate his or her authority under section 6.2 to the presiding judge of the Criminal Part." Nance, supra, 228 N.J. at 392 (citing Administrative Office of the Courts, Memorandum, Motions in Graves Act Cases – Delegable by Assignment Judge to Criminal Presiding Judge (Nov. 21, 2008); see also R. 1:33-6(a) (authorizing delegation of assignment judge's authority under court rules to presiding judge)). See also R. 1:33-6(a).

mandatory minimum term required by the Graves Act was deemed "unnecessarily and unproductively harsh." Cannel, New Jersey Criminal Code Annotated, cmt. 2 on N.J.S.A. 2:43-6.2 (2017).

The judge identified defendant's lack of a prior criminal record and his lawful ownership of the weapon used against the victim, as factors weighing in favor of the waiver. However, when examining the facts surrounding the crime, the judge concluded the totality of the facts presented neither "extraordinary or compelling reasons" to deviate from the Legislative policy underpinning the Graves Act.

The judge also evaluated the three "extraordinary or compelling reasons" identified in the Attorney General's Directive to law enforcement. Attorney General, Directive to Ensure Uniform Enforcement of the "Graves Act," (Oct. 23, 2008, as corrected Nov. 25, 2008) (the Directive).<sup>6</sup> The Directive was issued "to channel prosecutorial discretion" in cases governed by the Graves Act. State v. Benjamin, 228 N.J. 358, 372 (2017) (citing State v. Vasquez, 129 N.J. 189, 196 (1999)).

The Directive was designed to "ensure statewide uniformity in the enforcement of the Graves Act, and to provide reasonable incentives for guilty defendants to accept responsibility by

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<sup>6</sup> The Directive is available at <http://www.state.nj.us/lps/dcj/agguide/pdfs/Graves-Act-Oct23-2008.pdf>.



pleading guilty in a timely manner so as to maximize deterrence by ensuring the swift imposition of punishment." Id. at 4. Additionally, the Directive includes standards guiding the discretionary determination when seeking a Section 6.2 waiver. Id. at 12-13.

The judge recited the Directive identified "extraordinary and compelling reasons that take the case outside the heartland of the legislative policy to deter unauthorized gun possession" to warrant recommendation of a probationary sentence. These include: (1) a defendant's lack of prior criminal involvement; (2) the firearm was not loaded; and (3) the totality of the circumstances make clear the firearm posed no risk to police or public safety. Ibid. Here, although defendant satisfied the first instance, he could not meet either of the other two.

On appeal, defendant urges the judge erroneously concluded the prosecutor appropriately declined to seek waiver, arguing: (1) the decision does not serve the interest of justice; (2) the standard imposed of "extraordinary and compelling" reasons for a waiver was incorrect; and (3) the decision incorrectly applied aggravating and improperly denied applicable mitigating factors. We consider these assertions.

Because the prosecutor did not agree to seek a Section 6.2 waiver, the burden rests upon defendant, who must show "the

prosecutor arbitrarily or unconstitutionally discriminated" against a defendant when making the determination. State v. Mastapeter, 290 N.J. Super. 56, 65 (App. Div.), certif. denied, 146 N.J. 569 (1996). The judicial discretion embodied in examination of a prosecutor's Section 6.2 waiver decision -- that is, whether a custodial sentence "does not serve the interest of justice" -- is an objective legal standard based on the facts presented.

Initially, defendant asserts Section 6.2 provides a "presumption of probation" for a first-time offender. This claim is defeated by the unambiguous statutory language and is belied by the Legislature's 2013 amendment to N.J.S.A. 2C:43-6(c), which signaled a decision to impose tougher penalties for gun offenses by increasing the mandatory minimum term from three years to the current forty-two months. See P.L. 2013, c. 113 § 2, effective Aug. 8, 2013; see also Nance, supra, 228 N.J. at 396 (rejecting arguments suggesting Section 6.2 permits lighter sentences for first-time offenders who act with a gun than for those who do not use a gun). Accordingly, although Section 6.2 waivers are granted solely to first-time offenders, not all first-time offenders are granted Section 6.2 waivers.

We also reject defendant's claim the trial judge imposed a higher standard of proof for application of waiver than required

by the statute's "in the interests of justice" standard. Rather, we conclude the trial judge correctly analyzed the prosecutor's waiver decision and it was neither arbitrary nor a product of unconstitutional discrimination.

The interest of justice standard has a very limited application and requires a court to consider whether "the sentence reflect[s] the Legislature's intention" because "the severity of the crime [is] the most single important factor in the sentencing process." State v. Megargel, 143 N.J. 484, 500 (1996). A judge "must consider the nature of and the relevant circumstances pertaining to the offense[,]" including "facts personal to the defendant" such as the "defendant's role in the incident, to determine the need to deter him from further crimes and the corresponding need to protect the public from him." Id. at 500-01; see also Directive, supra, at 8.

Defendant pled guilty to, and was convicted of, a second-degree crime. As directed by the Supreme Court, the first consideration is the presumption of incarceration, stated in N.J.S.A. 2C:44-1(d).<sup>7</sup> See Nance, supra, 228 N.J. at 395-96. ("We

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<sup>7</sup> N.J.S.A. 2C:44-1(d) provides:

The court shall deal with a person who has been convicted of a crime of the first or second degree . . . by imposing a sentence of

construe section 6.2 and N.J.S.A. 2C:44-1(d) so as to harmonize the two components of the Code's sentencing scheme. Nothing in either provision suggests that a Graves Act waiver exempts a defendant convicted of a first or second-degree offense from the presumption of incarceration."). That said, the Court has also explained the special circumstances when it is appropriate to allow a probationary term, even for a crime with a presumption of incarceration. See State v. Jarbath, 114 N.J. 394, 414-15 (1989).

Section 6.2 limits application of waiver to first-time offenders where the circumstances of the offense show "the interests of justice would not be served by the imposition of the mandatory minimum term under the Graves Act." Nance, supra, 228 N.J. at 391. A review of the Directive relied upon by the prosecutor and noted by the trial judge, also emphasized the circumstances of the offense significantly dictates whether waiver in favor of a probationary sentence should be requested by the State. Directive, supra, at 12.

Here, figuring most prominently in the consideration not to seek a Section 6.2 waiver were the circumstances surrounding this

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imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.

offense. Defendant, in anger, retrieved a loaded gun and aimed it at the victim to threaten and intimidate him to act as defendant commanded. Even though defendant had not previously committed any crime, this offense most assuredly was the kind of conduct the Graves Act sought to deter: the misuse of a licensed firearm by threatening the life of another, placing the victim, the actor, and the public in danger. As the trial judge's opinion suggests, the facts in this case include no basis to support the interest of justice requires a probationary sentence.

The judge relied on the Directive on this issue. The Directive instructs prosecutors not to "move for or approve a sentence of probation except for extraordinary and compelling reasons that take the case outside the heartland of the legislative policy to deter gun possession . . . ." Directive, supra, at 12.

Defendant argues "extraordinary and compelling reasons" equates to the "serious injustice" standard, which erroneously enhances the statute's lesser standard of "in the interests of justice." Defendant seeks reversal because the judge mistakenly accepted this standard, which employed a higher burden.

Importantly, the serious injustice standard is found in N.J.S.A. 2C:44-1(d), which we noted above presumptively imposes incarceration for conviction of first- and second-degree offenses. See State v. Roth, 95 N.J. 334, 358 (1984) (holding the "serious

injustice" exception to the presumption of imprisonment applies only in "truly extraordinary and unanticipated circumstances."). The Supreme Court has recently reviewed the interrelationship of N.J.S.A. 2C:44-1(d) and Section 6.2. See Nance, supra, 228 N.J. at 396. Noting N.J.S.A. 2C:44-1(d) "imposes a high standard that must be overcome before a first- or second-degree offender may be sentenced to a non-custodial term[,]" the court clarified the need to "harmonize" Section 6.2 and N.J.S.A. 2C:44-1(d) as "two components of the Code's sentencing scheme." Id. at 395. Thus, "[b]y considering the standard of N.J.S.A. 2C:44-1(d) in deciding between the probationary and custodial sentences authorized by [S]ection 6.2, . . . [the court] achieves the legislative objectives of both provisions." Id. at 396. Further, "a contrary construction would produce unfair and anomalous results." Ibid.

In this light, without question, Section 6.2's probationary waiver for a Graves Act offense applies to a very narrow group of cases. The Attorney General's characterization of such cases as presenting "extraordinary and compelling reasons" aligns with the Court's interpretation. When examining imposition of a sentence for a first- or second-degree crime accompanied by the presumption of incarceration, the Court has repeatedly advised: "To forestall imprisonment a defendant must demonstrate something extraordinary or unusual, something idiosyncratic, in his or her background."

State v. Nwobu, 139 N.J. 236, 252 (1995) (quoting State v. Jabbour, 118 N.J. 1, 7 (1990)).

We abide the Court's discernment of the Legislature's intent, and may not enhance the statutory application as broadly as suggested by defendant.

The efficacy and perhaps even the wisdom of this approach may not be clear to some, but the message intended by the Legislature could hardly be clearer: if you are convicted of a crime against a person while using or possessing a firearm, you will go to prison for at least three years [now forty-two months]. Period. The Graves Act aims at deterrence through the eventually wide spread knowledge that one who is convicted of using or possessing a firearm while committing any one of a number of crimes cannot, and will not, escape a mandatory minimum imprisonment . . . .

[Des Marets, supra, 92 N.J. at 73.]

It also is important to note the Legislature vested the initial decision to seek waiver with the prosecutor. N.J.S.A. 2C:42-6.2 (providing the prosecutor decides whether to seek a Graves Act waiver and may advocate a particular sentence). As in other prosecutorial decisions, a reviewing court lacks authority "to substitute [its own] discretion for that of the prosecutor[.]" State v. Waters, 439 N.J. Super. 215, 237 (App. Div. 2015) (quoting Nwobu, supra, 139 N.J. at 253) (discussing prosecutor's decision to permit pre-trial intervention (PTI) for gun possession

offense). "Rather, courts must 'view the prosecutor's decision through the filter of the highly deferential standard of review.'" Id. at 237-38 (quoting State v. Wallace, 146 N.J. 576, 589 (1996)).

In Waters, this court evaluated the prosecutor's rejection of the defendant's request for PTI for a Graves Act offense, also guided by the Directive, and commented: "We need not decide whether [the] 2008 Directive's example ever compels a prosecutor to consent to PTI. It is sufficient to hold here that it does not do so where the defendant does not meet all the criteria in the example, or where there are other facts unfavorable to the defendant on which the prosecutor can properly rely as a basis for denying PTI." Id. at 237.

Such is the case regarding the matter at hand. Defendant did not meet the necessary criteria to warrant a waiver for a probationary sentence. State v. Watkins, 193 N.J. 507, 520 (2008). The trial judge considered the applicable case law and the guidance provided in the Directive. On this point, we conclude, as did the trial judge, the prosecutor's decision was not arbitrary and did not amount "to unconstitutional discrimination or denial of equal protection." Watson, supra, 346 N.J. Super. at 535; see also Mastapeter, supra, 290 N.J. Super. at 65 (holding to succeed on such a motion a defendant must show the prosecutor arbitrarily or unconstitutionally discriminated against a defendant in



determining whether the "interests of justice" warrant reference for sentencing under Section 6.2).

We cannot reach the same conclusion regarding the judge's analysis of whether the prosecutor's denial of the Section 6.2 waiver provision permitting imposition of a one-year period of parole ineligibility was arbitrary. This review implicates consideration of applicable aggravating and mitigating factors. Here, we conclude the judge erred in the aggravating and mitigating factor analysis. Consequently, we are constrained to remand for review of the parole ineligibility term.

In making his review of whether the facts support a Section 6.2 waiver of the mandatory parole ineligibility period, the judge adopted the prosecutor's arguments for application of aggravating and mitigating factors, N.J.S.A. 2C:44-(1)(a), (b). The judge agreed the facts supported aggravating factors: one, "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner"; three, the risk that the defendant will commit another offense; and nine, the need for deterrence. N.J.S.A. 2C:44-1(a)(1), (3), (9). He also applied mitigating factor seven, as defendant had previously led a law abiding life and not committed any prior criminal offense. N.J.S.A. 2C:44-1(b)(7).

The judge apparently rejected defendant's challenges to the use of aggravating factors one and three, as well as his arguments for application of mitigating factors four, substantial grounds which tended to excuse or justify defendant's conduct, though failing to establish a defense; eight, defendant's conduct was the result of circumstances unlikely to recur; and nine, the character and attitude of the defendant indicate that he is unlikely to commit another offense, N.J.S.A. 2C:44-1(b)(4), (8), (9).<sup>8</sup>

Finally, the judge concluded the applied aggravating factors substantially outweighed the mitigating factors. Therefore, he determined the State's rejection of the request to reduce the period of parole ineligibility to one year was justified, and suggested this matter was exactly the type of conduct the Graves Act intended to deter – a person who arms himself or herself with a loaded weapon before committing a crime. See Des Marets, supra, 92 N.J. at 68-69.

Although "aggravating and mitigating factors play no part in the decision to impose a minimum term in Graves Act cases[,]" a court may consider the aggravating and mitigating factors in setting the length of the minimum term. State v. Towey, 114 N.J. 69, 82 (1989); see also Nance, supra, 228 N.J. at 390-91 ("Although

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<sup>8</sup> At the hearing, the parties relied principally upon their written submissions, which were not included in the record.

the mandatory minimums are prescribed by the Graves Act, the sentencing court weighs the aggravating and mitigating factors, N.J.S.A. 2C:44-1(a) and (b), and exercises discretion over other aspects of the sentence.").

The Directive instructs prosecutors that a reduction of the minimum term of parole ineligibility to one year should not be recommended when "the aggravating factors applicable to the offense[, ] conduct[, ] and offender outweigh any applicable mitigating circumstances[.]" Directive, supra, at 13. Therefore, appropriate application of these factors is significant when deciding to request waiver.

Following our review of the record, we agree with defendant: the judge inappropriately applied aggravating factor one and must consider whether mitigating factors, particularly factor nine, apply in order to determine whether the prosecutor appropriately declined to seek waiver.

The Legislature "chose comprehensive language to define aggravating factor one." State v. Lawless, 214 N.J. 594, 609 (2013).

Under this factor, the sentencing court reviews the severity of the defendant's crime, "the single most important factor in the sentencing process," assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public. "The paramount reason we focus on the severity

of the crime is to assure the protection of the public and the deterrence of others." "The higher the degree of the crime, the greater the public need for protection and the more need for deterrence."

In that inquiry – focused on the magnitude of the offense as a measure of the need to shield the public and deter future crimes – courts applying aggravating factor one focus on the gravity of the defendant's conduct, considering both its impact on its immediate victim and the overall circumstances surrounding the criminal event.

[Id. at 609-10 (citations omitted).]

In this matter, the only explanation recited to apply this was because defendant pointed "a loaded handgun at his longtime friend." However, the use of the weapon is an element of the offense for which he was convicted. Therefore, identifying the same fact as an aggravating factor engages in impermissible double counting. See State v. Kromphold, 162 N.J. 345, 353-54 (2000) (holding finding of an aggravating sentencing factor cannot be premised solely upon an essential element of the crime for which defendant is being sentenced; such "double-counting" is not permitted).

Defendant also attacks application of aggravating factor three, the risk of re-offense, particularly because defendant had led a law-abiding life, as supported by application of mitigating factors seven. He argues he achieved sobriety, emphasizing his

alcohol abuse impaired his judgment and led to his commission of the offense. In applying aggravating factor three, the judge found defendant's alcohol abuse and the circumstances of this offense, suggested a risk defendant would reoffend, but he gave this factor less weight. The judge did not mention defendant's treatment.

We reject the notion aggravating factor three cannot coexist with mitigating factor seven. This is not correct. See State v. Case, 220 N.J. 49, 67 (2014) ("[W]e do not presume that aggravating factor three cannot coexist with mitigating factor seven . . . ."); State v. Varona, 242 N.J. Super. 474, 491 (App. Div.), certif. denied, 122 N.J. 386 (1990). The question for review is whether the cited factual findings are grounded in competent, credible evidence in the record. Roth, supra, 95 N.J. at 363.

Here, even though defendant had not previously broken the law, the judge explained, defendant's alcohol abuse was not an isolated or aberrant event. Also, defendant's uncontrolled anger directly led to the criminal conduct. We conclude these facts evinced by the record, sufficiently support the finding to apply aggravating factor three, which the judge accorded little weight.

We reject as meritless defendant's challenge to the application of aggravating factor nine, the need for general and specific deterrence. R. 2:11-3(e)(2).

Next, defendant states the judge erroneously rejected requested applicable mitigating factors. Mitigating factors that are called to the court's attention should not be ignored, see Blackmon, supra, 202 N.J. at 297, "and when 'amply based in the record . . . , they must be found[.]'" Case, supra, 220 N.J. at 64 (quoting State v. Dalziel, 182 N.J. 494, 504 (2005)). Moreover, during the deliberative process, a judge, must state the basis for rejecting a claimed mitigating factor. Ibid.

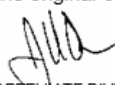
Assuming defendant's written submissions sought application of mitigating factors four, eight, and nine, the judge failed to mention why he determined them inapplicable. Although we could infer a basis to reject mitigating factor four and eight from the facts and the judge's findings, we choose not to do so. We also cannot infer what evidential support was used to reject evidence directed to application of mitigating factor nine, including defendant's completion of alcohol abuse treatment and counseling, his age, and years of continuous employment. Since we conclude remand is necessary because of the error in applying aggravating factor one, we also require the judge to provide the factual review of mitigating factors advanced by defendant.

Because of the need to reevaluate the applicable aggravating and mitigating factors, we remand for additional review of whether a Section 6.2 mitigation of the period of parole ineligibility is

appropriate. The judge must review the propriety of the prosecutor's denial of the request to seek imposition of the minimum Graves Act parole ineligibility period, once eliminating aggravating factor one and after evaluating and weighing whether evidence supports application of the requested mitigating factors.

Affirmed in part and remanded in part.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION